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No. 90-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EXXON CORPORATION,

Petitioner,

— v. —

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER), *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER EXXON CORPORATION

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QUESTIONS PRESENTED

1. Should this Court resolve the direct conflict among the Second, Fifth, Ninth and Eleventh Circuits and establish a uniform rule concerning whether admiralty jurisdiction exists on claims by agents who procure necessary marine services and/or supplies for vessels in the maritime commerce of the United States?

2. Should this Court overrule, or at least limit, its much criticized one page opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), which refused to recognize admiralty jurisdiction on a suit involving an agency contract calling for necessary marine services and supplies to be delivered to a vessel in the maritime commerce of the United States?

LIST OF PARTIES

The parties to the proceedings below are those set forth in the caption. Petitioner, Exxon Corporation, has no corporate parent. In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Petitioner annexed as Appendix D to its Petition for a Writ of Certiorari, a list of the subsidiaries which Exxon Corporation directly or indirectly owns by less than one hundred per cent (Pet. App. A36-A47). A revised list has been filed with the Clerk's Office.

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OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit was not reported but is reprinted in Appendix A to the Petition for a Writ of Certiorari. (Pet. App. A1-A2).

The opinions of the United States District Court for the Southern District of New York are reported at 717 F. Supp. 1029 and 707 F. Supp. 155 and are reprinted in Appendices B and C to the Petition for a Writ of Certiorari (Pet. App. A3-A35).

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was entered on April 5, 1990. Exxon Corporation filed a Petition for a Writ of Certiorari on July 3, 1990. The Petition for a Writ of Certiorari was granted on January 14, 1991. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, article III, section 2, clause 1, provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, the Citizens thereof, and foreign States, Citizens or Subjects.

The Judicial Code, 28 U.S.C. § 1333 (1964) (corresponds to The Judiciary Act of 1789, Section 9, 1 Stat. 76-77), provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and in all proceedings for the condemnation of property taken as prize.

Section 971 of the Federal Maritime Lien Act, 46 U.S.C. (1982 & Supp. V 1987) (now re-codified at 46 U.S.C. §§ 31341-42), provides:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

The Judicial Code, 28 U.S.C. § 2106 (1976), provides that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

I. The Facts

Respondent Central Gulf Lines, Inc. ("Central Gulf") was at all material times the owner of the United States flag cargo vessel M/V GREEN HARBOUR (ex WILLIAM HOOPER) (the "Vessel") (J.A. 12). Central Gulf bareboat chartered[1] the Vessel to Waterman Steamship Corporation ("Waterman") for use in Waterman's United States flag commercial liner service between ports in the United States and the Middle East, including Saudi Arabia (J.A. 12-13).

Exxon Corporation ("Exxon") was the supplier to Waterman of marine fuel oil for many years (J.A. 58-59). Under annually negotiated fuel oil supply contracts between Exxon and Waterman, Exxon provided marine fuel to all Waterman ships on a worldwide basis, either itself, or in locations where Exxon did not have its own bunker stations, through local supplying companies (J.A. 58-59, 22-23, 26-27). These fuel supply contracts, including the one covering the year in which the delivery in question was made, 1983 (J.A. 20-34), specifically provided that Exxon would have a lien on the receiving vessel for fuel supplied (J.A. 24-25).

Prior to January, 1982, Exxon supplied fuel under these contracts to Waterman at Jeddah, Saudi Arabia, through Exxon's local supplier, Arabian Marine Operating Co., Ltd. ("Arabian Marine") (J.A. 59-60). In January, 1982, Waterman, in order to take advantage of certain price discounts not available from Exxon in Saudi Arabia, ceased purchasing fuel from Exxon there under the annual fuel contracts, and

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[1] A bareboat charter is a contract where the charterer takes over the complete crewing, supplying and operating of a vessel becoming, in effect, the owner *pro hac vice*. G. Gilmore & C . Black, *The Law of Admiralty* 194 (2d ed. 1975).

began purchasing fuel directly from Arabian Marine under arrangements made separately between Waterman and Arabian Marine (J.A. 60, 63, 109). Waterman continued to purchase fuel from Exxon elsewhere than in Jeddah under the annual fuel supply contracts.

In early October 1983, Arabian Marine, because of financial difficulties being suffered by Waterman, refused to make further deliveries to Waterman at Jeddah (J.A. 60, 35, 49-51, 135). Exxon agreed to resume deliveries to Waterman at Jeddah under the annual fuel supply contracts, but on an individual, case by case basis (J.A. 61, 128). To effect deliveries at Jeddah, Exxon relied on previously existing contractual arrangements with Arabian Marine, to physically supply fuel there (J.A. 61). Under Exxon's existing arrangements with Arabian Marine, Arabian Marine would invoice Exxon, which would pay Arabian Marine the price of the fuel (J.A. 108, 120-121, 61). Exxon, in turn, would invoice Waterman, which was to pay Exxon (J.A. 61). This method was actually followed for a delivery by Exxon to Waterman at Jeddah prior to the delivery in question (J.A. 56-57, 60-61).

On October 7, 1983, Exxon itself physically supplied marine diesel oil to the Vessel at New York (the "New York Delivery") where it had its own bunker station (J.A. 62, 138-139). Exxon invoiced Waterman for this delivery but was not paid (J.A. 65).

On October 26, 1983 Exxon effected delivery of fuel oil to the Vessel at Jeddah (the "Jeddah Delivery") using Arabian Marine as the physical supplier (J.A. 15, 16, 140). Exxon was invoiced by Arabian Marine for the Jeddah Delivery (J.A. 70, 99-100) and Exxon paid the invoice (J.A. 56-57). Exxon thereafter invoiced Waterman (J.A. 17), but Exxon was not paid (J.A. 62).

Shortly thereafter, on December 1, 1983, Waterman filed for protection under Chapter 11 of the Bankruptcy Code (J.A. 14).

II. The Proceedings Below

Exxon commenced this litigation to enforce *in rem* maritime lien claims against the Vessel for the amounts due on the New York Delivery and Jeddah Delivery. Exxon brought suit under both the General Maritime Law and provisions of the Federal Maritime Lien Act which, at the time, were contained at 46 U.S.C. §§ 971 *et seq.* (1982 & Supp. V. 1987) (now re-codified at 46 U.S.C.A. §§ 31305–7, 31341-42). Exxon later moved for summary judgment arguing that United States law applied and that it was entitled to judgment as a matter of law. Central Gulf cross-moved for summary judgment.

In an opinion and order dated March 3, 1989 (Pet. App. A22-A35), the district court ruled that United States law applied. In addressing Exxon's lien claims, the court focused on the terms of the underlying contractual relationship between Exxon and Waterman. The court did not question admiralty jurisdiction over Exxon's lien claim for the New York Delivery on the ground that Exxon itself physically made this delivery (Pet. App. A33-A34). The Court granted judgment in favor of Exxon on that claim. *Id.* The court concluded, however, that Exxon acted as an agent with respect to the Jeddah Delivery because Arabian Marine, and not Exxon, had physically made the delivery (Pet. App. A27-A32). It held that Exxon's claim for the Jeddah Delivery was therefore outside admiralty jurisdiction and dismissed its claim, relying on the Second Circuit's decision in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) and this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). (Pet. App. A27-A32).

Exxon moved for reconsideration by the district court with respect to the Jeddah Delivery. Exxon argued, *inter alia*, that it was entitled to recover on its lien claim for the Jeddah Delivery on the following grounds: (i) Exxon was, on the facts, a seller and not an agent; (ii) if an agent, Exxon was a "special" agent as opposed to a *Minturn/Peralta* general agent;

and (iii) whether a seller or an agent, Exxon advanced funds (which are themselves necessaries) without which the Vessel would not have been supplied. In an opinion and order dated July 21, 1989, the district court denied Exxon's motion for reconsideration, again based on the Second Circuit's decision in *Peralta* and this Court's decision in *Minturn* (Pet. App. A3-A21).

In a Summary Order dated April 5, 1990, the Second Circuit affirmed the judgment of the district court "substantially for the reasons given" in the two district court opinions (Pet. App. A1-A2).

Exxon petitioned this Court for a Writ of Certiorari on July 3, 1990, within 90 days, as required by 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States. On October 1, 1990 the Court entered an Order inviting the Solicitor General to file a brief expressing the views of the United States. On December 17, 1990, the Solicitor General filed a brief recommending that the Petition for a Writ of Certiorari be granted. The Petition for a Writ of Certiorari was granted on January 14, 1991.

Exxon respectfully seeks an order that the judgment below denying admiralty jurisdiction as to the Jeddah Delivery be reversed and an order directing that the district court enter judgment in favor of Exxon for the amount due on its lien claim respecting the Jeddah Delivery.

Summary of the Argument

The decision below was based on this Court's 1855 decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). *Minturn* has come to stand for the proposition that general agency contracts, including those that call for the husbanding of vessels (that is arranging and sometimes paying for necessary vessel services and supplies), are outside federal admiralty jurisdiction. Commentator criticism of the *Minturn* rule and its progeny has been particularly harsh and there is virtually universal agreement that claims under general agency

contracts should be within admiralty jurisdiction. Similar criticism has even been voiced by those appellate courts which have found themselves compelled to follow *Minturn*. *See infra*, p. 12.

The *Minturn* decision itself is a short, page-length opinion, which does not indicate its underlying legal basis. However, analysis of the facts and arguments in *Minturn* and the jurisdictional tenets existing at the time of that decision, demonstrates that *Minturn* was based on principles long since abandoned.

Specifically, *Minturn* was based on vestiges of the restrictive English jurisdictional views that derived from arbitrary writs of prohibition issued by the English common law courts. These vestiges were: (1) a contract must be performed at least substantially on the sea to be considered a maritime contract; (2) admiralty jurisdiction was available only if an *in rem* lien existed; (3) if common law jurisdiction and/or a common law remedy were available, admiralty jurisdiction would be foreclosed; (4) no admiralty court could award equitable relief, such as an accounting, and (5) if an advance of marine necessaries was secured by other credit arrangements, admiralty jurisdiction might not exist. Legal developments since *Minturn* have, however, thoroughly repudiated each and every one of these principles.

Moreover, this Court's later decision in *The Kalorama*, 77 U.S. (10 Wall.) 104 (1869), distinguished and questioned *Minturn*. The facts in *The Kalorama* were similar to those in *Minturn*, except for the finding in *The Kalorama* that there had been an "express understanding" in that case that the repairs and supplies had been "made and furnished on the credit of the steamer." *Id*. at 214. In *The Kalorama*, the Court found admiralty jurisdiction existed and recognized a lien. There is a provision in the Exxon contract expressly providing that supplies are made "on the faith and credit of the vessel" (J.A. 24-25). The *Kalorama* result should therefore control the case at bar.

Minturn has also caused confusion and disagreement among the circuit courts which are sharply divided over whether to follow *Minturn*. They have created what have been called "hair splitting" distinctions in an effort to avoid its irrationality. Some courts have adopted a "special agency" exception to the "general agency" rule. The special/general agency distinction is particularly inapt since it excludes from jurisdiction the contract which provides the *greater* benefit to maritime commerce.

This Court has recently observed in admiralty tort cases that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce. *Sisson v. Ruby*, __U.S.__ , 110 S.Ct. 2891 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). For this same reason, commentators have argued that this Court should draw "into the jurisdiction all torts *and contracts* having principally to do with maritime commerce" thereby "fram[ing] a new rationality in the law of admiralty jurisdiction." G. Gilmore & C. Black, *The Law of Admiralty* 31 & n.98g (2d ed. 1975) (emphasis added).

The annual fuel supply contract involved here provided for and resulted in the supply of a vital ship need when the local supplier refused to make the supply. Even accepting the lower court's characterization of this contract as one of agency, it is difficult to think of a contract more intimately related to maritime commerce than the fuel supply contract in question.

The decision below ruling that Exxon's claim was outside admiralty is contrary to modern principles of jurisdiction developed by this Court, culminating in its recent decisions which recognize that the heart of admiralty jurisdiction is the protection and promotion of maritime commerce. The *Minturn* rule that led to the decision below should be overruled. At the very least, it should be held inapplicable to the Exxon fuel supply contract in this case, under which Exxon effected, advanced its credit, and paid for the fuel supply in question.

I.

The Minturn Rule Has Been Widely and Justly Condemned

The decision below held that Exxon's claim respecting the Jeddah Delivery was outside admiralty jurisdiction based on *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). This Court's one page, 1855 decision in *Minturn* states, in full:

> The respondents were sued in admiralty, by process *in personam*. The libel charges that they are owners of the steamboat Gold Hunter; that they had appointed the libellant their general agent or broker; and exhibits a bill, showing a balance of accounts due libellant for money paid, laid out, and expended for the use of respondents, in paying for supplies, repairs, and advertising of the steamboat, and numerous other charges, together with commissions on the disbursements, &c.
>
> The court below very properly dismissed the libel, for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of assumpsit, in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.
>
> The case is too plain for argument.

> The judgment of the court of admiralty, dismissing the libel for want of jurisdiction, is affirmed with costs.
>
> *Id.*

Minturn has long been cited for the rule that general agency contracts, including those that call for the husbanding of vessels (that is arranging and sometimes paying for necessary vessel services and supplies), are outside admiralty jurisdiction. In *E.S. Binnings v. M/V Saudi Riyadh*, 815 F.2d 660, 664 (11th Cir. 1987), the Eleventh Circuit gave a more complete description of the services performed under a general agency contract. The court noted such services might include:

> . . .coordinating vessel husbanding services, collecting documents and providing the necessary cargo-related documents for the cargo, soliciting cargo, responding to requests for information regarding arrival of vessels, freight rates and availability of vessels to carry particular cargo, collecting freights, remitting those freights to the principal, handling the flow of funds, including cash disbursements to the master and payment of the principal's bills, accounting and documentation services, clearing of vessels calling in the ports, attending to the needs of the crew and arranging tug service.

The services provided by general agents, including husbanding agents who provide and sometimes pay for essential vessel services and supplies, are essential to maritime commerce.

The *Minturn* holding that claims under such general agency contracts are outside admiralty jurisdiction has been thoroughly repudiated in light of modern decisions. Leading commentators have said of the *Minturn* rule: "[i]t is predicted that the Supreme Court, when the issue reaches it, will hold 'general agency' and other vessel-management agreements within the jurisdiction—along with actions for accountings on

them." G. Gilmore & C. Black, *The Law of Admiralty* 28, n. 94b (2d ed. 1975) (treatise hereinafter cited as "*Gilmore & Black*"). Similarly, Professor Moore has said: "[q]uite clearly, such agreements [agency and brokerage contracts] are an integral part of and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts." 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .250 at 3003 & 3006 (2d ed. 1988) (treatise hereinafter cited as "7A *Moore's Federal Practice*").

Appellate court criticism of the *Minturn* rule has been equally harsh. In fact, the Second Circuit, which has "faithfully adhered to the *Minturn* holding" has stated that, while "we are not free to anticipate the Supreme Court's overruling of *Minturn v. Maynard . . . we would welcome it.*" *Peralta Shipping Co. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 802, 804 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) (emphasis added). The Eleventh Circuit has also followed *Minturn*, despite recognizing that it has been "condemned by commentators" because only the "Supreme Court is the appropriate court" to overrule *Minturn*. *E.S. Binning, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 665 n.4 (11th Cir. 1987).

This Court recently "unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce. . . . " *Sisson v. Ruby*, __U.S.__, 110 S.Ct. 2892, 2896 n.2 (1990) *citing Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674-675, 679-680 (1982). Justice Blackmun summarized the irony of *Minturn* when he noted in his dissent from the denial of certiorari in *Peralta* that: "*Minturn* improperly excludes from federal maritime jurisdiction disputes that *directly concern the business of maritime commerce.*" 470 U.S. at 1033 (emphasis added).

Minturn has been condemned both because it is irrational and because the principles underlying it were abandoned long ago. Understanding the reasons for rejecting *Minturn* therefore

begin with an examination of the principles that gave rise to the *Minturn* decision.

II.

The Evolution of Admiralty Jurisdiction Prior to Minturn

A) Overview

The decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855) is extremely brief and does not adequately reveal the legal basis for the result in that case. That case can, however, be understood from an examination of the legal principles which had evolved up to the time of *Minturn* and which appear to have supported it. The development of these principles is set forth below. A summary of these principles is contained *infra* at 22. As explained in Point IV, all the principles supporting *Minturn* have now been rejected.

B) Origin and Development of English Admiralty Jurisdiction

As originally created and developed, English admiralty jurisdiction was broad in scope. *See generally* S. Friedell, 1 *Benedict on Admiralty* §§ 21-54 (7th ed. 1989) (treatise hereinafter cited as "1 *Benedict*"). Beginning in the late 1500s, however, the common law courts began to restrict the exercise of this jurisdiction by the issuance of writs of prohibition which, in an individual case, barred the admiralty court from proceeding. 1 *Benedict* § 41. These writs "were neither consistent in themselves nor reconcilable with principle." *Id.* Legal commentators have noted that these writs were issued by the common law courts "for more jurisdiction, for gain, [and] not for the public good . . . ." *Id.* As summarized in 1 *Benedict* § 50 at 3-22:

> It is thus clear that the ancient jurisdiction of the English Admiralty was of a most extended and beneficial character, embracing all maritime causes of

> action, but it is equally true, that by prohibitions on most inconsistent and extraordinary grounds, "granted," as Prynne says, "on sudden motions without solemn argument," the exercise of that jurisdiction was from time to time restrained by the King's Bench within very narrow limits.

Justice Story criticized the narrow English writs of prohibition and other restrictions on admiralty jurisdiction in *DeLovio v. Boit*, 7 F. Cas. 418, 421-441 (C.C.D.Mass. 1815) (No. 3, 776). As observed by Justice Story, among the limitations contained in the common law writs were the points "[t]hat where the common law hath jurisdiction it excludes the admiralty, *id.* at 427, and "the admiralty has jurisdiction, only when the parties have bound themselves *in rem.*" *Id.* at 439. Justice Story observed that the decisions of the English common law courts attempted generally to confine admiralty jurisdiction "to things wholly and exclusively done upon the sea. . . . " *Id.* at 431. He further observed that under the writs a contract was considered maritime only if "made upon the high seas" and "to be executed on the high seas. . . . " *Id.*

By the end of the 18th Century, the writs of prohibition had seized from the English admiralty all but the narrowest jurisdiction. 1 *Benedict* § 51. The writs, although effective in preventing the admiralty courts from proceeding in a given case, were incapable of diminishing the inherent jurisdiction of the admiralty courts:

> The Court of King's Bench had power to issue prohibitions, but it had no power to extend or diminish the jurisdiction of the Admiralty. That jurisdiction was conferred by the King's prerogative and royal commission, or by statute, or immemorial usage, and not otherwise, and could be limited only in the same manner.
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> *Id.* § 50 at 3-23.

There was another restriction on the English admiralty courts: "[w]here suits were brought in admiralty which called for equitable relief, the Chancellor [of the equity court] would enjoin the prosecution of the action." S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 11 (1933). Although few in number, such injunctions "were as effective as the writs of prohibition issued by the common law judges." *Id.* On this basis, for example, a request for an accounting between part owners of a vessel was considered outside the jurisdiction of the English admiralty. *The Appollo*, 166 Eng. Rep. 109 (1824).

Ironically, after 1789, when American courts began to construe their newly granted admiralty jurisdiction, based, in part, on the English writs, English admiralty jurisdiction began to reject the narrow writ approach and to recover its broad scope. 1 *Benedict* §§ 52, 57 & 126 n.28 and the authorities cited therein; S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 12-13 (1933).

C) Origin and Development of American Admiralty Jurisdiction up to Minturn

(1) *Overview*

Article III, Section 2 of the Constitution extended the "judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." By Section 9 of the Judiciary Act of 1789, Congress implemented this grant, providing: ". . . the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. . . . "

There was, however, little guidance given to the courts as to the meaning of the grant of admiralty jurisdiction. The early decisions dealing with the subject can perhaps best be described as the courts taking one step forward, defining a new American jurisdiction, and two steps backward, following the

restrictive English writs. Many of these restrictive precedents later resulted in the *Minturn* decision.

(2) *DeLovio v. Boit—Blueprint for a Broad Jurisdiction*

Early American cases initially followed the restrictive English jurisdictional approach from the writs of prohibition. S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1, 3 (1933). However, *DeLovio v. Boit,* 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) decided by Justice Story, riding circuit, promised to be the seminal case of an expansive new American admiralty jurisdiction. In *DeLovio*, Justice Story rejected the idea that American admiralty jurisdiction should be constrained by the English view. Instead, Justice Story argued for a jurisdiction that included "all things done upon and relating to the sea, or, in other words, all transactions and proceedings relating to commerce and navigation." *Id.* at 441. Expanding on admiralty jurisdiction, he stated in *DeLovio:*

> At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. *The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.*

Id. at 443 (emphasis added).

Justice Story then offered the following blueprint for maritime contract jurisdiction, which has yet to be fully realized:

> The next inquiry is, what are properly to be deemed "maritime contracts." Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance.

Id. at 444.

As will be seen from the following sections, notwithstanding the broad jurisdictional framework suggested in *DeLovio,* later cases frequently did follow restrictive English precedents, including cases authored by Justice Story himself.

(3) *Vestiges of Restraint on American Admiralty Jurisdiction Relevant to the Minturn Analysis*

In analyzing *Minturn*, it is helpful to understand American court treatment of the following vestiges of restraint on admiralty jurisdiction virtually all of which originate from the English writs.

(a) *The Home Port Rule*

In *The General Smith,* 17 U.S. (4 Wheat.) 438 (1819) (Story, J.), the Court ruled that a supplier of necessaries could not acquire a lien for supplies made in the vessel's home port. In *dicta*, Justice Story suggested that a lien in a vessel's home port could be created under state law and enforced in a federal admiralty court.

(b) *Equitable Accountings*

In *The Steamboat New Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837) (Story, J.) the Court, among other grounds for its decision, accepted the English rule that "the admiralty has no jurisdiction at all in matters of account between part-owners." *Id.* at 182.

(c) *Rejection of the English "Body of the County"*

Waring v. Clarke, 46 U.S. (5 How.) 441 (1847) dealt with another English limitation: that the admiralty had no jurisdiction over occurrences "within the body of a county." A divided Court abandoned this limitation and held that admiralty jurisdiction existed where a collision occurred "within the body of a county."

(d) *The Concept of Mutual Exclusivity of Admiralty and Common Law Remedies and the Concept that Admiralty Has No Jurisdiction Without a Lien*

In *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827), a concurring opinion embraced two of the restrictions contained in the English writs, stating "[i]f the common law can try the cause, and give full redress, that alone takes away the Admiralty jurisdiction," *id.* at 631, and "[t]hat in case of contracts, it [the admiralty] has no jurisdiction at all *in personam*, except as incident to the exercise of its jurisdiction *in rem*." *Id.* at 640.

Similarly, the dissenting opinion in *Waring v. Clarke*,[2] 46 U.S. (5 How.) 441 (1847), addressing the mutual exclusivity of admiralty and common law remedies, stated:

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[2] *Waring v. Clarke* appears to be one of a number of early cases in which the Court was closely divided on various aspects of admiralty jurisdiction. In that case, for example, three justices dissented, including Justice Grier who would later author *Minturn*. Justice Catron wrote a concurring

(Footnote continued)

> *And our fathers never could have meant*, that parties, for matters happening within a county or State, *should be dragged into admiralty* any more than in equity, *if as full a remedy, and of as good a kind, existed in courts of law, where they could enjoy their favorite mode of trial*. This would leave much to admiralty still, as well as to equity, and more especially in the former, by proceedings *in rem*.

Id. at 472 (emphasis added) (citation omitted).

In *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849) the Court concluded that there was no *in personam* jurisdiction for a general average claim where the vessel owner had given up its lien on the cargo by delivery. The case seems understandable only on the basis of the then prevailing notion that there could be no jurisdiction in admiralty without a lien.[3] In arriving at the result in that case, the Court stated, in language that would later be reflected in *Minturn:* "[i]ndeed this case seems, in its principles, to be nothing more than the common law action for money had and received, brought in a court of admiralty." *Id.* at 732.

(e) *Limited View of a Maritime Contract*

M'Dermott v. The S.G. Owens, 16 F. Cas. 15, 1 Wall. Jr. 370 (C.C.E.D. Pa. 1949) (No. 8,748) is a revealing circuit court opinion by Justice Grier who, six years later, would write for the Court in *Minturn*. In reversing a decision of the district court, Justice Grier held that a stevedore's claim against

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opinion. According to the dissenting opinion only "four members of this court" participated in the majority opinion. *Id.* at 475.

[3] *See also* Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 603 (1985).

a vessel for loading and stowing cargo was outside admiralty jurisdiction. Echoing themes straight from an English writ of prohibition, he wrote: "[t]he services are performed on a contract, which is neither made at sea nor for a service to be performed at sea; both were in the port of Philadelphia, and within the county of Philadelphia. The ship was safely moored at the wharf. . . . " *Id.* at 371.

The Court[4] in *The New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 47 U.S. (6 How.) 344 (1848), stated that a contract, to be maritime, had to involve a service that was "substantially performed upon the sea, or tidewaters." *Id.* at 391. It will be noted that this represents only a slight modification of the English locality test. The dissent (joined by Justice Grier), would have reverted to the restrictive English jurisdictional views, including the view that jurisdiction was "limited in matters of contract (seamen's wages excepted) to things agreed upon and to be performed upon the sea. . . ." *Id.* at 409. Under either the Court's or the dissent's views, admiralty contract jurisdiction was based on locality and, at the very least, the services had to be substantially performed upon the sea.

(f) *Rejection of the "Tidewater" Limitation*

In *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825) (Story, J.) the Court held that a seaman's claim for wages arising from a voyage on the Missouri River was outside admiralty jurisdiction because of the English "tidewater doctrine," which prohibited admiralty from

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[4] As in *Waring v. Clarke*, the Court in *The New Jersey Steam Navigation* case was sharply divided. Only four justices concurred in the opinion of the Court. Four justices dissented or concurred in opinions which provided different jurisdictional views from those in the opinion of the Court. The ninth justice, Justice M'Kinley, did not take part in the decision.

exercising jurisdiction in waters above the ebb and flow of the tide.

In *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851), the Court, while noting inconsistency with its prior decisions, rejected the English tidewater limitation, and upheld recent legislation that extended admiralty jurisdiction to the Great Lakes, i.e., above the ebb and flow of the tide.

(g) *General Agents Prior to Minturn*

There appears to be no clear case, prior to *Minturn*, holding that general agency contracts were, *per se*, outside admiralty jurisdiction. However, in accordance with the legal thinking of the time, a contract was not considered maritime unless it was, at least, substantially performed on the sea. Furthermore, general agents were, during this period, frequently part owners of the vessels they served. As stated in C. Perkins, *Abbott on Shipping*, 105-6 (6th Amer. ed. 1850): "[i]t is usual for the several part-owners to appoint a person, frequently one of their own number, to be the manager of their joint concern, their general agent in the use and employment of the vessel, under the name of ship's husband." As already observed, disputes between part owners were considered outside admiralty. *The Steamboat New Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837).

(h) *Loss of Admiralty Jurisdiction When a Note Secures the Debt*

In *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827), the furnisher of marine necessaries had taken a negotiable promissory note in payment for the necessaries. The Court, in a one sentence opinion, found it had no jurisdiction. It appears from Justice Story's later explanation of *Ramsay* in *The Nestor*, 18 F. Cas. 9 (C.C.D.Me. 1831) that admiralty jurisdiction could not exist in such a case unless the note were first surrendered to the admiralty court. This had apparently not been done in *Ramsay*.

(4) *Summary of Relevant Jurisdictional Principles Prior to Minturn*

At the time that *Minturn* came to the Court for decision in 1855, the following appears to have been the state of various restrictions on American admiralty jurisdiction:

1. The English "body of the county" and "tidewater" restrictions had been rejected in the United States.

2. Many vestiges remained of the English writs of prohibition, however, including the narrow view that a contract had to at least be substantially performed on the sea to be maritime.

3. Certain relief was considered unavailable in admiralty. If, for example, one sought an accounting or other equitable relief, admiralty could not provide it.

4. Members of this Court were still writing dissenting and concurring opinions concerning: (a) whether admiralty jurisdiction and/or common law remedies were mutually exclusive, and (b) whether admiralty required the existence of an *in rem* lien.

5. No federal maritime lien was recognized for necessary services or supplies rendered in a vessel's home port.

6. A dispute between part owners of a vessel was not within admiralty jurisdiction. (At the time, general agents were frequently part owners of the vessels they serviced).

7. A furnisher of marine necessaries might not be allowed to sue in admiralty if he took a note for his services and failed to surrender it to the admiralty court.

III.

Minturn v. Maynard

A) The Facts in Minturn

The Record filed in this Court in *Minturn* shows that in 1850 Charles Minturn was appointed "Agent and Broker" in San Francisco for the steamboat Gold Hunter (*Minturn* Record at 3, 13, 16 & 21). San Francisco was the home port of that vessel. *Id.* at 21. As agent, Minturn paid sums of money for labor, services, materials and supplies to the vessel. He also received and disbursed funds for the vessel owners. He was to receive a 5% commission on all amounts either received or disbursed by him (*Minturn* Appellant's Brief at 1).

The *Minturn* record also shows the defendant made certain jurisdiction-related allegations, including that: Minturn had rendered accountings in the past to the part owners and had isolated the *pro rata* amount that each part owner would owe; all of the part owners paid Minturn and received receipts in discharge of the amounts owed, except for a Mr. Grant; Minturn took a note from Grant for the amount owed; when Grant failed to pay the note at maturity, Minturn sued Grant in state court and attached his interest in the Gold Hunter; and suit was still pending on the note in state court when Minturn started his action in the federal court (*Minturn* Record at 2310[5]).

In the meantime, the Gold Hunter had been arrested, condemned and sold in the federal district court on an unrelated claim. *Id.* at 4, 13 & 17. Sale proceeds were in the registry of the Court. *Id.* Minturn then sued all the part owners in the

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[5] The *Minturn* Record's printed page numbers stop at page 28. The page following page 28 in the *Minturn* Record is handwritten page number 2310.

federal district court and sought an accounting against them for the amount which apparently had been owed by Grant. Attached to Minturn's complaint were seven pages of proposed accountings for settlement by the federal district court of balances allegedly due. *Id.* at 5-11. Minturn also sought *quasi-in-rem* maritime attachment of the funds in the registry. *Id.* at 4.

In briefing the case, the defendants raised virtually all of the limitations on jurisdiction summarized *supra* at 22. *See* Minturn Appellees' Brief at 4-9. Justice Grier, who had endorsed the English limitations on admiralty jurisdiction,[6] was chosen to write the opinion of the Court. (The full opinion of the Court is set out *supra* at 10-11).

B) **Analysis of Minturn**

(1) *Overview*

At least according to the legal thinking of the time, there were sufficient defects in the jurisdictional basis of *Minturn's* suit to convince all of the Justices of the Court to subscribe to Mr. Justice Grier's short and vague opinion. Professor Moore has observed: "some remnant of the restrictive English mentality regarding the admiralty appears to have been present in the minds of the court that decided the early cases." 7A *Moore's Federal Practice* ¶ .250 at 3004-5 & n.10. This appears to be particularly true of the *Minturn* holding.

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6 See, for example, Justice Grier's concurrence with Justice Woodbury's dissent in *Waring v. Clarke*, *supra* at 18-19; Justice Grier's concurrence with Justice Daniel's dissent in *New Jersey Steam Navigation Co.*, *supra* at 20; and Justice Grier's opinion in *M'Dermott*, *supra* at 19-20.

(2) *Home Port/No Admiralty Jurisdiction Without a Lien*

The very first point made by the *Minturn* defendants (the "Appellees" in this court) in their brief was the fact that the services had been supplied in the vessel's home port (Appellees' Brief at 4). Under *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), this meant that Minturn could not have had a lien on the vessel under the prevailing federal maritime law. Justice Grier then found the possibility of a lien arising under "the local law of California"[7] foreclosed on the grounds that Minturn had "never dealt on the credit, pledge, or security of the vessel," as apparently required.

The jurisdictional consequences of Minturn's lack of a lien were fatal, at least to those Justices who believed that without a lien there could be no admiralty jurisdiction.

(3) *Common Law/Equitable Remedies*

The pre-*Minturn* cases appear to have only barely, if at all,[8] resolved the question of whether admiralty and common law "jurisdiction" were mutually exclusive. In any event, there was apparently strong support for the view, expressed in *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849) that if a common law "*remedy*" were available, this would foreclose jurisdiction in admiralty. In *Minturn*, Justice Grier, echoing the language in *Cutler v. Rae*, stated that Minturn's "proper remedy" was "an

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7 It was then possible to enforce a state-created lien in the home port in the federal admiralty court. This was overruled shortly after *Minturn*. *See* D. Robertson, *Admiralty and Federalism*, 127-28 (1970).

8 *See, e.g.*, dissent and concurrences in *Waring v. Clarke, 46 U.S. (5 How.) 441 (1847)* and *New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 47 U.S. (6 How.) 344 (1848). While not entirely clear, on the issue of mutual exclusivity of common law and admiralty jurisdiction it appears the Court was divided 4-4.

action of *assumpsit*, in a common law court," thereby implying that such a remedy foreclosed jurisdiction in admiralty.

In the same sentence, Justice Grier stated that "[t]he libel shows nothing but a balance of accounts between agent and principal." As noted above, a request for a court to settle the balance of accounts was considered a form of equitable relief not available in admiralty under cases such as *The Steamboat New Orleans v. Phoebus*, and *The Appollo*, 166 Eng. Rep. 109 (1824). Both of these cases had been cited to the Court by defendants at page 6 of their brief. Under the then prevailing authority, the seven pages of proposed accountings annexed to Minturn's complaint, which had as its object settlement by the district court of the balance of accounts due, rendered the case outside admiralty.

(4) *Not a Maritime Contract*

In their arguments to the Court in *Minturn*, the defendants had cited Justice Grier's opinion in *M'Dermott v. The S.G. Owens*, 16 F. Cas. 15, 1 Wall. Jr. 370 (C.C.E.D. Pa. 1849) (No. 8,748) and another case cited therein. (Appellees' Brief at 5). Both of these cases were based on the premise that a maritime contract existed only if "made at sea for a service to be performed at sea." *The New Jersey Steam Navigation* test of a maritime contract was only slightly more liberal, but it still required that the service be substantially performed on the sea. Since Minturn's actions were performed on land, he could not satisfy the then prevailing test of a maritime contract.[9]

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[9] In fact, six weeks before *Minturn*, in *Bogart v. The John Jay*, 58 U.S. (17 How.) 399, 402 (1855), the Court, without elaborating any particular test of a maritime contract, held that a mortgage on a vessel "has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction." *See also People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857) holding that a suit on a contract to build a vessel was

(Footnote continued)

Furthermore, Minturn had apparently reduced the amount owed on the underlying debt to a note. Minturn had actually sued on the note in state court and that action was still pending. Under cases such as *Ramsay v. Allegre*, 28 U.S. (12 Wheat.) 611 (1827) the note, at least until surrendered, stood in place of the underlying debt. Since the note would, more obviously, not then be viewed as a maritime contract, it would appear that Minturn had no admiralty jurisdiction for this additional reason.

IV.

Post-Minturn Developments

A) Overview

The English limitations of the "body of the county" and "tidewater" doctrines were rejected prior to *Minturn*. Like these, the restrictive principles which supported the *Minturn* holding were also rejected in later cases.

B) Post-Minturn Developments Concerning No Jurisdiction Without a Lien

The idea that *in personam* maritime jurisdiction could exist only if the claimant was entitled to a lien continued to enjoy support for a time after *Minturn*. Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 604 & n.38 (1985). However, in *Insurance Co. v. Dunham*, 78 U.S. 90 (1871), the Court ruled that admiralty jurisdiction does exist in the case of an *in personam* libel on a marine insurance contract despite the fact that no *in rem* lien right exists.

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outside admiralty jurisdiction, stating that "it was a contract made on land, to be performed on land." 61 U.S. (20 How.) at 402.

C) Post-Minturn Husbanding Where Lien Is Relied On

The Kalorama, 77 U.S. 204 (1869) decided two companion cases in which the plaintiffs had each provided services virtually identical to the services provided in *Minturn*. According to the defendants, the plaintiffs had

> . . .assumed entire charge of the steamers for a series of voyages, and were to receive the specified compensation of 10 per cent commission on the gross freights. They became the agents of the owners; freighted the ships, collected the freights, and paid their expenses. These agents appointed captain, officers, and crew, ordered supplies, and stood in the place of owners generally."

Id. at 207 (Statement of counsel for appellees); *see also id.* at 213.

Notwithstanding the apparent similarities between the facts in *The Kalorama* and the facts in *Minturn*, the plaintiffs in *The Kalorama* were found to have maritime liens (and not just admiralty jurisdiction) on account of the advances they had made on behalf of the vessel for marine supplies. The only meaningful difference between the *Minturn* facts and *Kalorama* facts appears to be the finding in *The Kalorama* that there was an "express understanding" that the repairs and supplies in that case were "made and furnished on the credit of the steamer. *Id.* at 214. One of the defendants in *The Kalorama* urged that *Minturn* controlled, and that the plaintiffs'claim was therefore outside admiralty jurisdiction. The Court brushed this aside, distinguishing and questioning *Minturn* with the comment that *Minturn* "does not control the case before the court *even if the rule be admitted to be correct without any qualification*." *Id.* at 217 (emphasis added); *see also The Emily B. Souder*, 84 U.S. (17 Wall.) 666 (1873).

Minturn and *The Kalorama* line of cases appear to be irreconcilable. *Minturn* holds that an agent's claim for advances

is outside admiralty jurisdiction. That holding cannot survive this Court's later decision in *The Kalorama* where, on similar facts, the plaintiffs were held entitled to admiralty jurisdiction and a lien. If *The Kalorama* decision is distinguishable from *Minturn* on some hair-splitting analysis, that distinction should certainly not determine the availability of admiralty jurisdiction today.

D) Post-Minturn Developments Concerning Common Law and Equitable Remedies

The notion that a common law remedy and equitable relief was unavailable in admiralty survived for some time after *Minturn*. In *The Eclipse*, 135 U.S. 599 (1890), discussing equitable relief, this Court stated:

> While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, or declare or enforce a trust or an equitable title, or exercise jurisdiction in matters of account merely, Minturn v. Maynard, 17 How. 477, or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees, and direct possession of her to be given to them.

Id. at 876 (all citations but *Minturn* omitted).

Perhaps the first significant indication of a change in the limitation on remedies available in admiralty occurred in this Court's decision in *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933). In that case the plaintiff sued in admiralty to recover an alleged overpayment of freight against the ocean carrier. Jurisdiction was challenged on the grounds that "the payment for excess freight was made under mistake" and hence that "the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty [i.e. an action in assumpsit]." *Id.* at 124. The

Court brushed these objections aside stating "[a]dmiralty is not concerned with the form of the action, but with its substance." *Id.*

In *Archawski v. Hanioti*, 223 F.2d 406, 407 (2d Cir. 1955), *rev'd*, 350 U.S. 532 (1956), the Second Circuit held a claim for the return of wrongfully withheld passage money to be outside admiralty stating that the claim was "in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of monies by respondents on the theory that in equity and good conscience, he is under a duty to pay them over to libellants." This Court reversed, stating:

> *We conclude that, so long as the claim asserted arises out of a maritime contract, the admiralty court has jurisdiction over it.*
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> * * *
>
> Rights which admiralty recognizes as serving the ends of justice are often indistinguishable from ordinary quasi-contractual rights created to prevent unjust enrichment. How far the concept of quasi-contracts may be applied in admiralty it is unnecessary to decide. *It is sufficient this day to hold that admiralty has jurisdiction, even where the libel reads like indebitatus assumpsit at common law*, provided that the unjust enrichment arose as a result of the breach of a maritime contract. Such is the case here.

Id. at 535-36 (emphasis added).

Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961) involved a managing agency contract. Under the contract in that case, the agent was to "operate the vessel, obtain freight or freight engagements, collect the freight monies and, after deducting all operating expenses, remit the balance to the owners." *Id.* at 700. Plaintiff sued for the balance allegedly due under the contract. Defendants moved to dismiss on the

grounds that the libel "was a suit for an accounting and was therefore beyond admiralty jurisdiction." *Id.* at 700. Judge Brown, who has been called "our leading admiralty authority,"[10] had no trouble finding the agency contract in that case a maritime contract.[11] He then concluded that the court could issue the requested relief, stating:

> If, because the process of adjudication goes a step beyond 2 plus 2, the admiralty loses power, we would have the spectacle of things essentially maritime and thereby automatically within the constitutional supremacy clause [citation omitted] being forced into common law, or equity, courts for determination. Indeed, it would be even more absurd. It would, barring the accident of diversity of citizenship, send essentially federal problems to state courts since there is no jurisdiction on the civil side over a maritime cause of action.

Id. at 704-5.

Swift & Co. Packers v. Compania Colombiana Del Caribe S.A., 339 U.S. 684 (1950) involved the question of whether admiralty had jurisdiction to perform the "equitable" function of looking into an alleged fraudulent transfer of title to a vessel. The Court held that admiralty could provide the requested equitable relief, stating:

> It would be strange indeed thus to hobble a legal system that has been so responsive to the

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[10] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971).

[11] Judge Brown wrote: "To begin with, the contract is everything classically known as a maritime contract. It concerns a ship. It relates not only to a ship, its very purpose is to effectuate the physical, economic operation and employment of a vessel." 290 F.2d at 703.

> practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce. . . . We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article III of the Constitution.

Id. at 691-92 (emphasis added).

Legal developments since *The Eclipse* have brought the availability of equitable relief in admiralty law almost full circle from the examples cited in that case. Admiralty courts now 'specifically enforce' contracts, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); correct mistakes, *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933); review allegedly fraudulent transfers of title, *Swift, supra;* exercise jurisdiction in matters of account, *Hadjipateras, supra;* and decree the sale of a ship under a new, statutorily created preferred ship mortgage, *The Thomas Barlum*, 293 U.S. 2142 (1934). *See* S. Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. (1933); *Gilmore & Black* at 40-43. *see also* L. Colby, *Admiralty Unification*, 54 Geo. L.J. 1258, 1268-69 (1966); *but see* D. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 Mich. L. Rev. 1625, 1637-45 (1976).

Also, as demonstrated in *Archawski, Krauss Brothers* and *Hadjipateras*, admiralty courts will now take jurisdiction of a suit even though it is similar to a common law action in assumpsit.

E) Post-Minturn Developments Concerning Nature of a "Maritime" Contract

The prevailing test of a maritime contract at the time of *Minturn* was that a contract had to be substantially performed on the sea to be maritime. This "locality" test appears to be a key basis of the *Minturn* decision.

The first significant change in the "locality" test came in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 90 (1871). The contract of insurance involved there was neither made on the sea nor performed on the sea. In *Dunham*, this Court, quoting from *The St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1861), rejected a "locality" approach and stated that the boundary for admiralty and maritime jurisdiction should be "ascertained by a reasonable and just construction of the words in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government." *Id.* at 97. Based on this broad test of jurisdiction, the Court concluded that an insurance contract warranted inclusion within admiralty jurisdiction.

The Court further distanced itself from the "locality" approach in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) stating that the "boundaries of admiralty jurisdiction over contracts" are "conceptual rather than spatial." *Id.* at 735. In determining whether a contract is maritime, the Court said that "[t]he only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce. . . ." *Id.* at 736. Applying a "conceptual" test of jurisdiction, the Court ruled that a post-voyage agreement by a vessel owner to indemnify a seaman for any consequences he might suffer by virtue of being treated at a public health hospital was a maritime contract because it "related to and stood in place of a duty created by and known only in

admiralty [i.e. the duty to pay maintenance and cure] as a kind of fringe benefit to the maritime contract of hire." *Id.*

In addition, cases decided under the Federal Maritime Lien Act[12] ("Lien Act ") have been particularly aggressive in abandoning the "locality" approach in favor of a broad conceptual test. Under such cases, the mere fact of a resulting *benefit to a vessel,* rather than the fact that a service was *performed on the vessel* or *on the sea,* is the key to admiralty jurisdiction and a lien. Furthermore, these cases are quite liberal in determining what constitutes a benefit to a vessel and "[t]he present state of the law is not far from the point where any service which is 'convenient, useful and at times necessary' may qualify as a lien under the Lien Act." *Gilmore & Black* at 658.

Furthermore, cases under the Lien Act have held that an *advance of credit* to purchase marine necessaries is itself a marine "necessary" that gives rise to a lien. *Universal Shipping Inc. v. The Panamanian Flag Barge,* 563 F.2d 483 (lst Cir. 1976); *Crustacean Transportation Corp. v. Atlantic Trading Corp.,* 369 F.2d 656 (5th Cir. 1967).

F) Post-Minturn Summary

The principles supporting *Minturn* have now been thoroughly rejected. Most significantly, a contract no longer has to be performed substantially on the sea in order to be maritime. Admiralty can award relief even though a suit resembles a common law action in assumpsit or calls for equitable relief. Furthermore, it appears from *The Kalorama* that the *Minturn* rule itself should no longer have any force in a case, such as the one at bar where there was "an express understanding" that the services or supplies were "made or

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[12] Now recodified at 46 U.S.C.A. §§ 31305-31307, 31341-31342.

furnished on the credit of the steamer." *The Kalorama,* 77 U.S. at 214. (*See* J.A. 24-25).

V.

The Minturn Rule and Its Progeny Are Irrational, Have Not Led to Predictability, and Cannot Be Justified

A) Irrationality of the Minturn Rule

Irrespective of how the *Minturn* rule evolved and why it is here, the rule that a general agent's claim is outside admiralty is irrational, as noted by the commentators and courts, referred to in Point I, *supra.*

B) Minturn Has Not Led to Predictability

Central Gulf has suggested that *Minturn* has redeeming value because it is simple and predictable.[13] This is erroneous. As pointed out by Justice Blackmun in his dissent from denial of certiorari in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.,* 470 U.S. 1031 (1985), "[n]ot only is the Minturn rule of dubious validity, but in efforts to narrow its application, the Court of Appeals have developed a number of equally questionable exceptions to the rule that have created confusion and disagreement." *Id.* at 1033-34. As discussed in Exxon's Petition for Writ of Certiorari, there is a sharp conflict in the lower courts both over whether *Minturn* is still viable and over various exceptions and distinctions that have been adopted to avoid its impact. The Court of Appeals for the Second Circuit, for instance, has noted *Minturn's* "erosion in other circuits" based on what it called "hair-splitting distinctions." *Peralta,* 739 F.2d 798 at 803-4. The Ninth Circuit rejected *Minturn* on the grounds that it, and other such

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[13] *See* Central Gulf Opposition to Petition for Certiorari at 5.

cases "[u]nder more modern decisions" are "of doubtful validity." *Hinkins Steamship Agency, Inc. v. Freighter, Inc.*, 498 F.2d 411, 412 (9th Cir. 1974). The Fifth Circuit has found a managing agency contract within admiralty jurisdiction in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961) despite the lack of any material distinction between the agency contract there and the one in *Minturn*. *Peralta*, 739 F.2d at 804; *Gilmore & Black* at 28 & n.94b.

In attempts to distinguish *Minturn*, a number of courts have added to the confusion by adopting a special agent/general agent distinction and have allowed an agent deemed to be "special" to have both admiralty jurisdiction and a lien, despite *Minturn*. *Ameejee Valleejee and Sons v. M/V Victoria U.*, 661 F.2d 310 (4th Cir. 1981). Ironically, this distinction excludes from admiralty jurisdiction the claim of the agent who provides the greater range of services to maritime commerce. The district court in case at bar refused to adopt this special agent/general agent distinction (Pet. App. A12-A16). This has created a split among the cases in the Second Circuit itself over the existence of the special/general agent distinction, since other courts in the circuit have recognized it.[14] There is, in fact, a second layer of splintering concerning which of several tests should apply to determine "special" agency.

Minturn does not promote simplicity or predictability.

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[14] *Trinidad Corp. v. Sea-Hire Service S.A.*, 1984 A.M.C. 2371, 2373 (E.D.N.Y.), *aff'd.*, 742 F.2d 1441 (2d Cir.), *cert. denied*, 467 U.S. 1242 (1984); *P.T. Perusahean v. T.S. Salzachtal*, 373 F. Supp. 267, 277-78 (E.D.N.Y. 1974).

C) The "Preliminary Contract" Rationale Neither Leads to Predictability Nor Justifies the Minturn Rule

The so-called "preliminary contract" concept is not a rule of this Court, but rather a rule stated in the post-*Minturn*, district court case of *The Thames*, 10 F. 848 (S.D.N.Y. 1881). This theory attempts to exclude from jurisdiction those contracts that are "preliminary" to a maritime activity. It neither promotes predictability nor justifies exclusion of general agency contracts from admiralty.

Although this concept was not specifically mentioned in *Minturn*, some courts have come to rationalize *Minturn* on the basis of it. The district court in the case at bar, for instance, characterized the *Minturn* rule as a "subset of the preliminary contract doctrine" and was "not persuaded that the two principles should be distinct." (Pet. App. A17). Justice Blackmun, in his dissent from the denial of certiorari in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985) stated: "this Court, since the time of its single-page opinion in *Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235 (1855), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for 'husbanding' a vessel, that is, arranging for the performance of services that are preliminary to maritime movement." *Id.* The Eleventh Circuit stated in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987): "[t]he reason for excluding such contracts [i.e. contracts such as that in *Minturn]* is the distinction long recognized in admiralty between contracts that involve *preliminary* services leading to maritime contracts and those that are themselves maritime." *Id.* at 633 (emphasis added).

The *Minturn* rule has been criticized when considered as a part of the preliminary contract theory. As noted by Professors Gilmore and Black, the preliminary contract notion "is one of the vague ideas that has to be reckoned with in the twilight zone of jurisdiction." *Gilmore & Black* at 26 n.91. They specifically criticize precedent holding that "some

transactions closely connected with maritime transportation have been excluded, on the ground they were "merely preparatory to such transportation." *Id.* at 31. Other commentators have similarly complained that the preliminary contract idea "has played a role in leading some courts to exclude from the admiralty jurisdiction matters like general agency agreements that are 'intimately related to the shipping industry and would warrant inclusion within admiralty.' " 1 *Benedict* § 183.

One might argue that the preliminary contract theory is simple and easy to apply. This is belied by cases that have allowed, as within admiralty jurisdiction, suits on contracts which arguably could be characterized as preliminary, such as contracts for the lease of ocean shipping containers[15], contracts reserving cargo space on a ship[16], contracts by a port terminal owner to supply a container handling crane to a stevedore[17], contracts for preparing cargo to be shipped[18], and even one case concerning the contract of "an oil bunker broker" to arrange marine fuel oil.[19] *See also id.*

Moreover, simplicity has also never been the litmus test for issues of constitutional dimension. As the Court noted in *Sisson v. Ruby*, ___ U.S. ___, 110 S.Ct. 2892 (1990) "the demand for tidy rules can go too far, and when the demand

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15 1 *Benedict* § 184 n. 21.

16 *Id.* n. 8.

17 *Id.* n. 22.

18 *Id.* nn. 31, 32.

19 *Forsythe International U.K. Ltd. v. M/V Ruth Venture*, 1986 A.M.C. 621, 622 (D.Ore. 1985).

entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction it *has* gone too far." (emphasis in original). *Id.* at 2896 n.2.

Furthermore, the cases decided under the preliminary contract notion are based on the outdated English "locality" test. As stated by Professor Moore:

> The courts long ago rejected the "locality" test in determining maritime contract jurisdiction and adopted the "subject matter" test. Nevertheless, in the area of contracts with brokers and agents, courts persist in drawing distinctions quite obviously carried over from the former practice, which placed great emphasis upon the place of performance or execution. *Only by applying a location test could it be convincingly stated that agreements to procure charters, to arrange contracts of maritime affreightment, and to arrange for or oversee the numerous other necessary activities often delegated to brokers and agents are not directly related to maritime commerce. That the contractual obligations of such brokers and agents are entered into and carried out on land and that the maritime tasks are not performed by the brokers themselves should, if Insurance Co. v. Dunham is still valid authority, be of no consequence.* Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts.
>
> 7A *Moore's Federal Practice*
> ¶ .250 at 3004-3006 (emphasis added)

Finally, in the area of fuel supply contracts, where there is often a chain of contracts leading to physical delivery, most courts have not applied the preliminary contract concept, despite the fact that all but one of the contracts in the chain was arguably "preliminary." They have, instead, granted jur-

isdiction and a lien to the supplier who had the contract with the party supplied, irrespective of whether a third party made the physical delivery pursuant to a chain of contracts. In *The Golden Gate*, 52 F.2d 397 (9th Cir.), *cert. denied*, 284 U.S. 682 (1931), for instance, the Ninth Circuit had no trouble finding the libelant-seller entitled to a lien for fuel physically supplied by a third party, stating: "[i]nasmuch as the contract of sale was between the libelant [i.e. like Exxon here, the seller to the charterer] and the charterer, and the supplies were furnished by the libelant pursuant thereto, it is immaterial who made delivery." *Id.* at 400; *See also Gulf Trading & Transport Co. v. Tento*, 694 F.2d 1191, 1192 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Tramp Oil and Marine, Ltd. v. M/V Mermaid*, 805 F.2d 42, 44 (lst Cir. 1986).

Here, Exxon made the delivery to Waterman and Waterman purchased the fuel "pursuant" to the then applicable annual fuel supply contract. As in *The Golden Gate*, it should therefore be "immaterial who made the delivery."

VI.

Admiralty Contract Jurisdiction Under this Court's Modern Decisions

A) Overview

The reasons for overruling *Minturn* and allowing general agency contracts within admiralty jurisdiction are so compelling that no particular rationale for doing so appears to be required. Commentators and this Court have, however, already provided a rationale that leads to both the overruling of *Minturn* and the establishing of a modern framework for maritime contract jurisdiction. Briefly, this rationale requires review of the constitutional purpose of the grant of admiralty jurisdiction and a "conceptual" analysis which considers that purpose and the contract involved.

B) The Purpose of the Constitutional Grant of Admiralty Jurisdiction

(l) *Commentators*

One theme common to the commentators is that the test of admiralty jurisdiction is incomplete unless it is "conceived with the basic purpose for the existence of a separate body of admiralty laws in mind." 7A *Moore's Federal Practice* ¶ .225 at 2711. Professors Gilmore and Black similarly believe "[w]hether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all." *Gilmore & Black* at 30-31. They have also suggested that decisions by this Court "could frame a new rationality in the law of admiralty jurisdiction" by including within it those cases in tort and in contract "having *principally to do with maritime commerce.*" *Gilmore & Black* 31 & n.98g (emphasis added). This Court's recent decisions, discussed below, appear to have already formed the tort "half" of the "new rationality." The "other half" of this "new rationality" would be "an equally general affirmative holding drawing into the jurisdiction" all "contracts having principally to do with maritime commerce." *Id.* The Second Circuit, in criticizing Minturn and suggesting that it be overruled by this Court, specifically "agree[d] with the commentators that the jurisdictional boundaries should reflect the concerns underlying the grant of jurisdiction—the federal interest in promoting and protecting the maritime industry—and that 'all those cases involving the enforcement, policing, or adjustment of business arrangements as a practical matter primarily concerned with sea, lake and river transport' should be within the admiralty." *Peralta, supra* 739 F.2d at 804 quoting, C. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 274 (1950).

(2) *The Early Cases*

One finds clear support in past cases for testing maritime contract jurisdiction against the purpose of the constitutional grant. This can first be seen in *DeLovio v. Boit*, 7 F. Cas. 418

(C.C.D. Mass. 1815) (No. 3,776). In *DeLovio*, Justice Story said that "national policy, as well as juridical logic" require a broad construction of admiralty contract jurisdiction. *Id.* at 443. In both *The St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1861) and *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 90, 97 (1871) this Court stated that the test of jurisdiction should be "ascertained by a reasonable and just construction of the words in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government."

(3) *Recent Supreme Court Cases*

This Court's most recent statements concerning the purpose of the Constitutional grant of federal admiralty jurisdiction have been in tort cases. However, the purpose underlying the Constitutional grant of federal admiralty jurisdiction is the same regardless of whether the matter sounds in tort or in contract.

Historically, admiralty tort jurisdiction depended on the locality of the wrong. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), however, the Court rejected "a purely mechanical application of the strict locality test" for admiralty tort jurisdiction. *Id.* at 261. The Court emphasized that "it is far more *consistent with the history and purpose of admiralty jurisdiction* to require also that the wrong bear a significant relationship to traditional maritime activity." Id. at 268 (emphasis added).

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) involved a collision between noncommercial vessels. The Court there acknowledged that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce. . . ." *Id.* at 674; *see also id.* at 679-680 (Powell, J., dissenting). A majority of the Court, however, rejected the argument that *Executive Jet's* requirement of a "significant relationship with traditional maritime activity" could only arise from a relationship with commercial maritime activity. *Id.* at 674. Instead, the majority found that the

"potential disruptive effect" on maritime commerce arising from the collision justified federal admiralty jurisdiction over the incident. *Id.* at 675. The Court indicated that when a "potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity . . . admiralty jurisdiction is appropriate." *Id.* at 675 n.5.

Last term, in *Sisson v. Ruby*, __U.S.__, 110 S.Ct. 2892 (1990), the Court applied the *Foremost* analysis to a case involving a fire which began on a yacht docked in a marina. Respondents there argued that the first half of the *Foremost* analysis was not satisfied as the potential disruptive effect on maritime commerce caused by the fire "was minimal because no commercial vessels happened to be docked at the marina when the fire occurred." *Id.* at 2896. The Court rejected such a fact specific jurisdictional inquiry, and explained that the inquiry must focus on the general type of incident involved to determine whether that general type of incident has a potential for disrupting commercial maritime activity. *Id.*

Although *Executive Jet, Foremost* and *Sisson* were tort cases, all clearly state that the fundamental purpose of federal admiralty jurisdiction is the federal interest in protecting and promoting maritime commerce. As quoted by Justice Powell in the dissenting opinion in *Foremost*, " '[t]he only valid criteria of the admiralty jurisdiction is the relation of the matter — whether it be tortious or contractual in nature — to *maritime commerce*.' " 457 U.S. at 680 (quoting 7A *Moore' Federal Practice* ¶ .325[5] at 3006) (emphasis in original).

(4) *Protection and Promotion of Maritime Commerce and the Maritime Lien*

The concept of the maritime lien requires special mention. The existence of a maritime lien has a dual benefit for maritime commerce. First, it protects a vital segment of the business of maritime commerce, i.e., the service sector. Second, it benefits vessels because it promotes the prompt availability of vessel services and supplies. The absence of admiralty jurisdiction

and lien status in the area of fuel supplies puts these benefits at risk. The facts in this case are particularly pertinent to this point. Here, Waterman was experiencing financial difficulties. The local supplier refused to make a supply to the Vessel in a foreign port. Exxon, believing it had a lien under the then applicable fuel supply contract, effected the delivery. Without a lien, future deliveries by fuel suppliers in such situations would be in doubt.

(5) *Uniformity and Constitutional Purpose*

Another important consideration in determining whether to include a particular contract within admiralty jurisdiction is its potential impact on the uniformity of admiralty law throughout the United States. 1 *Benedict* 105. As Justice Blackmun has noted: "uniformity and predictability in the maritime industry were the ends sought in the Constitution. . . ." *Peralta*, 470 U.S. at 1034 (Blackman J. dissenting from denial of certiorari). Whenever considerations important to the shipping industry are involved, admiralty jurisdiction should exist to protect and promote the goal of uniformity.

C) Application of Constitutional Purpose to the Contract

The second part of the jurisdictional analysis under this Court's cases is the consideration of the transaction in question in light of the purpose behind the Constitutional grant. While by no means exhaustive, in a contract setting, this analysis might include the following factors:

- Would interruption of the service have an impact on maritime commerce?

- Is the service in question provided solely or principally to the maritime industry, or is it a generic service provided to many industries?

- Does the service call for some special knowledge of, training for, or adaptation to, maritime commerce or navigation?

- Might there be some need for a uniform, national law concerning some or all of the service?

- Would granting a maritime lien in connection with the service appear proper and helpful to maritime commerce?

Other criteria would no doubt also be relevant to the jurisdictional inquiry. Whatever the criteria, the nature and impact of the particular service should be considered with the Constitutional goal of protecting and promoting maritime commerce in mind.

In fact, courts do a similar jurisdictional analysis now, when a newly considered contract, such as a lease of ocean shipping containers, comes up for consideration.

VII.

This Court's Modern Analysis Applied to the Case at Bar

The result in the case at bar flows from what has been said about post-Minturn developments. The *per se* rule in *Minturn*, and the principles that led to that rule are now anachronistic. Under the unanimous view of courts and commentators, the *Minturn* rule is also irrational and claims under general agency contracts, should be within admiralty jurisdiction. This should be particularly true for the so-called "general agency" contract in the case at bar, under which Exxon not only provided vital vessel supplies through Exxon's local supplier, but Exxon advanced its credit and ultimately paid the local supplier for the supply.

Furthermore, the very purpose of the constitutional grant, the protection and promotion of maritime commerce, is directly

implicated in this case. The local supplier here refused to supply fuel to the Vessel because of Waterman's weak finances. If Exxon had not supplied fuel, as it did, under its so called "agency contract," the Vessel would have eventually come to a physical stop. It would be hard to imagine a clearer interruption to maritime commerce.

As this Court noted in *Detroit Trust Co. v. S.S. Thomas Barlum*, 293 U.S. 21 (1934), "[w]e have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters." *Id.* at 52. The *Minturn* rule excluding general agency contracts from admiralty jurisdiction should be discarded or, at least, held inapplicable to Exxon's suit and lien claim respecting the Jeddah Delivery.

VIII.

Request for Relief

Except for application of *Minturn*, Exxon should have an enforceable lien in this case by reason of Exxon, having itself effected the supply, *The Golden Gate*, 52 F.2d 397 (9th Cir.), *cert. denied*, 284 U.S. 682 (1931), having advanced credit, *Universal Shipping, Inc. v. The Panamanian Flag Barge*, 563 F.2d 483 (lst Cir. 1976) and having paid for the supply, *Compagnia Maritima La Empressa, S.A. v. Pickard*, 320 F.2d 829 (5th Cir. 1963) (Brown, J.).

In addition, under this Court's decision in *The Kalorama*, Exxon should be entitled to judgment on its lien claim because there was, in the case at bar, an "express understanding" that the supplies were "made and furnished on the credit of the steamer." 77 U.S. at 214. In particular, Article 6.7(B) of the pertinent annual fuel supply contract provides:

> Deliveries of Marine Fuel hereunder are made not only on the credit of the Buyer but also on the faith and credit of the vessel which uses the Marine Fuel and it is agreed that Seller [i.e. Exxon in the definitional section] and Supplying Company will have and may assert a lien against such vessel for the amount of the delivered price of said Marine Fuel.
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> (J.A. 24-25)

Moreover, Exxon invoked the Lien Act in its Complaint. This legislation, except for *Minturn*, should apply to the Jeddah Supply. The Lien Act, as then worded[20], stated that "it shall not be necessary to allege or prove that credit was given to the vessel. . . ." 46 U.S.C. § 971. The leading commentators have observed that "the presumption that the lienor relied on the lien has become all but conclusive . . ." *Gilmore & Black* at 668. *Gulf Trading & Transportation Co. v. The Vessel Hoegh Shield*, 658 F.2d 363, 368 (5th Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982) (Brown, J.) ("We agree with the District Court's conclusion that while Gulf obviously relied upon the credit of the charterer Multinational in furnishing bunkers to the Vessel, there is no evidence that Gulf relied *solely* on the personal credit of Multinational or otherwise took any action with the purposeful intention of foregoing its maritime lien on the Vessel") (emphasis in original). *See also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 750 (5th Cir. 1985).

Furthermore, the testimony of Exxon in the case at bar affirmatively showed that Exxon relied on the credit of the vessel and Exxon's lien status. As stated by the Exxon salesman who handled the Waterman account: ". . . yes, if

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20 At the time the Complaint was filed the Lien Act was contained at 46 U.S.C. §§ 971, *et seq*. Legislative history shows no substantive change was intended by recent amendments to the Lien Act. 1988 U.S. Code Cong. & Ad. News 6104 *et seq*. (*see* particularly 6108).

push comes to shove at the end of the day, Exxon could always go and lien the vessel. . . . So it's something that, sure, it's a given." (J. A. 80-81; *see also* testimony of Exxon's Credit Manager at J.A. 140-143).

Therefore, there is no reason why Exxon should not be entitled to judgment on its lien claim in this case.

In fact, this case proceeded on motions and cross-motions for summary judgment. Both parties provided their claims and defenses on the merits with proof that is contained in the Record. The Jeddah Delivery was argued simultaneously with the New York Delivery. The Jeddah Delivery was, in every material respect other than the physical supplier, identical to the New York Delivery. In the case of the New York Delivery, where *Minturn* was not in issue, the district court awarded summary judgment in favor of Exxon.

Except for the impact of *Minturn*, there is no remaining issue in the case. It is respectfully submitted that the Court should reverse and remand the case with a direction for the district court to enter judgment in favor of Exxon (less credit to be agreed or set by the district court for amounts paid) in connection with Exxon's motion for summary judgment respecting its lien claim for the Jeddah Delivery. 28 U.S.C. § 2106. Remanding the case for any other purpose would lead to a waste of judicial resources. *The First National Bank of Pennsylvania v. The Lincoln National Life Insurance Co.*, 824 F.2d 277, 282 (3d Cir. 1987).

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the judgment below, which held Exxon's suit and lien claim respecting the Jeddah Delivery were outside admiralty jurisdiction, be reversed, and that the district court be directed to enter judgment in favor of Exxon, after giving Central Gulf credit for amounts paid, and for any further and different relief as may be just and equitable.

Respectfully submitted,

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